UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 538

Case No. 566: AL-ATRAQCHI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 18 October 1990, Mohammed Ali Al-Atraqchi, a staff member of the United Nations, filed an application containing the following pleas:

"II. PLEAS

The Tribunal is respectfully requested:

1. To find that the Secretary-General has failed to suspend staff rule 104.14 (which governs promotions) as required by staff regulation 12.3, and that, therefore, the Vacancy Management and Redeployment System introduced by ST/AI/338 and addenda, is illegal.

2. To find that the discretionary power of the Secretary-General to promote staff members is not absolute as claimed by the Respondent during the JAB [Joint Appeals Board] proceedings.

3. To find that Applicant did not receive the fullest consideration with regard to his candidacy for the post D-1, Chief International Security and Regional Affairs Section, Department of Political and Security Council Affairs, No. 88-P-PSC-267-NY.

4. To find that the Secretary-General's refusal to accept the unanimous report of the JAB contradicts his commitment to accept all unanimous reports of the JAB, provided that they do not impinge on any major questions of law or principle.

5. To find that the Secretary-General's refusal to investigate, as unanimously requested by the JAB in paragraph 44 of its report, the contention that it was widely known that Mr. Nicolae Ion would get the contested D-1 post even before he was promoted, proves that the selection process was vitiated from the beginning.

6. To conclude that the selection process which awarded Mr. Ion a promotion to D-1 was, therefore, null and void.

7. To conclude that Applicant was the most qualified of all candidates.

8. And consequently, to order:

(a) Respondent to promote Applicant to the D-1 level, retroactively to the date when Mr. Ion was promoted to D-1.

(b) Retroactive wages and benefits at the D-1 level less wages and benefits received at the P-5 level from no later than the date of confirmation of the promotion which was denied to Applicant.

(c) Respondent to grant Applicant, in case this Tribunal does not wish to order specific performance, damages equal to two years net base salary.

(d) Additional damages for the continuous hinderance to the development of Applicant's career."

Whereas the Respondent filed his answer on 11 March 1991;

Whereas the Applicant filed written observations on 12 April 1991;

Whereas, on 27 August 1991, the Respondent submitted an additional document at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967 under a probationary appointment at the P-2 level as an Associate Statistician with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969 his appointment was converted to a permanent appointment and on 1 June 1970 he was promoted to the P-3 level

as a Statistician. On 1 September 1973 the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974 he was promoted to the P-4 level and, on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

In 1988 the post of Chief of the International Security and Regional Affairs Section, a D-1 post, became vacant in the Political Affairs Division of the Department of Political and Security Council Affairs. Its vacancy was announced in Vacancy Announcement 88-P-PSC-267-NY. Staff members at level D-1 or P-5 were eligible to apply. The Applicant and other staff members applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and Administrative Instruction ST/AI/338 of the same date (and its addenda).

According to this administrative instruction, the system was designed to fill through redeployment essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future, but it was only the first step towards establishing a more rational human resources management system and towards a more comprehensive procedure that would involve a thorough review of all posts in the context of measures being taken to streamline and rationalize the Organization. Under the new system, all posts vacant or expected to become vacant would be reviewed by departments and offices to determine which posts were essential in order to meet programme mandates; all vacancies to be filled would be advertised and qualified staff members would be invited to apply, including those serving within the office where the vacancy was located; the candidates would be reviewed and evaluated by a Redeployment Committee - whose functions would be initially entrusted to the Appointment and Promotion Board at Headquarters for posts in the Professional category and above - which would recommend a short list of staff members determined to be the best qualified for each vacancy; and the short list of candidates would be communicated to the heads of department or office concerned, who would then make the final

selection. However, as the 1986 promotion review was already under way, vacant posts already identified for staff members recommended for promotion would not be included in the review described above.

All applications for the post of Chief of the International Security and Regional Affairs Section were accordingly forwarded to the Appointment and Promotion Board which, at its 1524th meeting held on 16 March 1989, short-listed six candidates, including the Applicant, and decided that their names should be transmitted to the Department for final selection. Such transmission was effected on the following day by the Office of Human Resources Management in a memorandum from which it appears that only one of the six candidates had more seniority in grade than the Applicant. On 3 April 1989 the Office of Human Resources Management informed the Applicant that, after careful evaluation of his application for the vacancy, he had not been selected for the post.

On 20 April 1989 the Applicant requested the Secretary-General to review the administrative decision of 3 April 1989, stating inter alia that his academic background, work experience in the Department and seniority were superior to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulations 4.2 and 4.4. On 30 January 1990 the Applicant reiterated his request, asking for a reply within two weeks. On 27 February 1990, having received no reply, he lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board adopted its report on 24 August 1990. The Board's conclusions and recommendations read as follows:

"Conclusions and Recommendations

40. The Panel unanimously

Finds that the Vacancy Management and Staff Redeployment System was introduced without the concomitant formal suspension or amendment of the relevant Staff Rules and Regulations governing promotion.

Finds that the General Assembly, by its resolution 44/185, has not approved the Vacancy Management and Staff Redeployment System and cannot be invoked, anyway, in support of the Respondent's position regarding this appeal, as it cannot have retroactive effects.

> Finds that the appellant did not show that he would have been promoted against the contested D-1 post if staff rule 104.14(f)(iii) had been adhered to. However, the appellant has been deprived of the right to be selected by an independent body established after consultations with the appropriate staff representative body, as set out in staff rule 104.14(f)(iii)(a), (b) and (c).
>
> Finds that the selection process was not entirely satisfactory and that doubts resulting from the appellant's statements have not been properly dealt with by the Administration.
>
> 41. The Panel recommends that the appellant be awarded a compensation corresponding to one month net salary.
>
> 42. The Panel makes no further recommendation in support of the appeal."

On 24 August 1990 also the Applicant submitted to the Joint Appeals Board the following document dated 23 August 1990 and signed by nine staff members:

> "With regard to the D-1 post No. 88-P-PSC-267-NY, in PSCA [Political and Security Council Affairs], the following staff members, some of whom had applied for the post, would like to state that they were already aware, even before the vacancy announcement was advertised, that this D-1 post was earmarked for Mr. Nicolae Ion, who was eventually selected to fill the said post and, unfortunately, this seems to be the established policy in filling vacancies in the Department."

The Joint Appeals Board accordingly included in its report additional remarks in which it stated in paragraph 44 that in view of the seriousness of the charge and of the fact that it was not competent to conduct inquiries which might involve disciplinary sanctions, it took note of the document and transmitted it to the Secretary-General with the recommendation that he establish a special investigating body to look into the matter.

On 6 September 1990 the Under-Secretary-General for Administration and Management communicated the Secretary-General's final decision to the Applicant in a letter reading in part:

"...

The Secretary-General has re-examined your case in the light of the Board's report. With regard to your claim for selection to the post in question, it should be noted that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. The Secretary-General noted that your application and that of other qualified staff was fully and fairly considered by the Appointment and Promotion Board under the Vacancy Management and Staff Redeployment System in accordance with the Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 and Addenda 2, 3 and 5 and that the vacancy management procedures were observed.

The Secretary-General, as Chief Administrative Officer, introduced the Vacancy Management System, after consultation with the staff, as an appropriate measure to deal with an emergency situation. The Organization has been operating under the Vacancy Management System since 22 December 1986 when the Secretary-General promulgated it in ST/SGB/221 and ST/AI/338, and it thus became part of your conditions of employment.

The Secretary-General has accordingly decided to maintain the contested decision and to take no further action on your case."

On 18 October 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General has failed to suspend staff rule 104.14, as required by staff regulation 12.3.

2. The discretionary power of the Secretary-General to promote staff members is not absolute.

3. The Applicant's candidature did not receive the fullest consideration.

4. The Secretary-General is committed to implement unanimous recommendations of the Joint Appeals Board.

5. The failure of the Secretary-General to investigate the affidavit signed by nine staff members stating that it was widely known that Mr. Ion would receive the promotion to D-1 even before he was officially selected proves that the selection process was vitiated ab initio.

Whereas the Respondent's principal contentions are:

1. The introduction and subsequent implementation of the Vacancy Management System was a valid exercise of the Secretary-General's responsibilities as Chief Administrative Officer. The Vacancy Management System meets the requirement of a fair and reasonable promotion procedure:

(a) The selection procedure complied with the Vacancy Management System;

(b) The alleged prejudice is not supported by facts.

2. Recommendations of the Joint Appeals Board are not binding on the Secretary-General.

The Tribunal, having deliberated from 15 October to 1 November 1991, now pronounces the following judgement:

I. The Applicant challenges a decision of the Secretary-General dated 6 September 1990 which did not accept a unanimous Joint Appeals Board recommendation of an award of one month's net salary to the Applicant in compensation for the Applicant having been deprived of his right to be considered for promotion under staff rule 104.14. In addition, the Joint Appeals Board found that the selection process under the Vacancy Management System was not entirely satisfactory and that doubts resulting from the Applicant's statements had not been properly dealt with by the Administration.

II. The premise underlying the Joint Appeals Board's recommendation regarding staff rule 104.14 is that, in the view of the Board, that rule was not effectively suspended by Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 and addenda 2, 3 and 5. The Tribunal, in Judgement No. 537, Upadhya (1991), has held to the contrary, and the

reasoning as well as the outcome of that judgement are applicable to this case. The Respondent was therefore on solid ground in viewing the Joint Appeals Board recommendation with respect to the Vacancy Management System and staff rule 104.14 as impinging on a major question of law or principle and in declining to accept the recommendation for the reasons stated in his decision of 6 September 1990.

III. The foregoing disposes of the Applicant's pleas 1 and 4. The Applicant also asks the Tribunal to find that the discretionary power of the Respondent is not absolute. Although this is clearly the case as is shown by the Tribunal's consistent jurisprudence on the subject of promotions, the Tribunal does not understand the Respondent to contend otherwise as suggested by the Applicant's plea 2. That plea, accordingly, requires no further consideration by the Tribunal. The Respondent's position is that the Applicant was properly considered for selection to the D-1 post in issue under the Vacancy Management System. The Tribunal will examine that question.

IV. In paragraph 24 of its report, the Joint Appeals Board considered the procedure that had been followed under Administrative Instruction ST/AI/338 with respect to the D-1 post, and stated that it "could not detect any evidence of discrimination in this selection process." The Board concluded that "the procedure set forth in Administrative Instruction ST/AI/338 and its addenda had been adhered to." However, the Board also expressed concern that in the selection of a candidate to fill the D-1 post, the candidate's assessment was based on criteria different from the qualifications required in the vacancy announcement. The Board expressed even greater concern because the Applicant had, without refutation by the Respondent, alleged that the decision to select the candidate who was appointed to the post had been made long before the selection process had actually taken place. If this were the case, it would have constituted unfair treatment of all the short-listed candidates other than the individual selected. This concern

was touched on again by the Board in its additional remarks when it commented on a document dated 23 August 1990 submitted by a number of staff members in support of the Applicant's allegation.

V. With respect to the Joint Appeals Board's concern regarding assessment of the successful candidate on the basis of criteria different from those set forth in the vacancy announcement, the Tribunal is unable to discern any material difference between the rather general description contained in the vacancy announcement and the criteria mentioned by the Under-Secretary-General for Political and Security Council Affairs in a note for the record dated 22 March 1989 which specifically focused on the contents of the official job description for the post. In addition, by a subsequent communication to the Legal Counsel dated 13 December 1990, which is not necessarily dispositive of the matter, the Under-Secretary-General denied that the selection was made before the selection process had actually taken place and further denied that the staff members who signed the document mentioned above had subsequently been threatened with retaliatory action.

VI. In view of the foregoing, the Tribunal is unable to conclude that the Vacancy Management System procedures were not fully adhered to, or to conclude on the record before it that the Applicant's non-selection reflected unfair treatment. The Tribunal concurs in the concern expressed by the Joint Appeals Board with regard to the document dated 23 August 1990 which is referred to above and endorses the Board's recommendation for an investigation. The Tribunal recalls its comments in Judgement No. 507, Fayache (1991), para. XVI:

> "It is surely desirable that the Administration do what it reasonably can, by word and by deed, to dispel such perceptions. For if they are ignored and not dealt with expeditiously, fundamental values of the Organization are apt to be eroded."

The Tribunal notes with dismay the apparent absence, on the part of the Administration, of any inquiry of the staff members involved with respect to either the perception or the alleged threat described by them to determine and evaluate their basis, and the absence of any other investigation beyond obtaining the comments of the Under-Secretary-General for Political and Security Council Affairs. The Tribunal trusts that the Respondent will (a) act on the recommendation made by the Joint Appeals Board in paragraph 44 of its report, (b) conduct a full investigation with respect to this matter, including the alleged threat of retaliatory action, and (c) take such further action, if any, as may be appropriate. The Tribunal considers that the inadequate action with respect to the concerns expressed by the Joint Appeals Board regarding the document dated 23 August 1990, in itself, constituted unfair treatment of the Applicant for which the responsibility of the Organization is engaged and that compensation should be paid to the Applicant for the injury to him.

VII. In agreement with the findings of the Joint Appeals Board with respect to the Respondent's adherence to the Vacancy Management System procedures, the Tribunal is unable to find, as urged by the Applicant in his pleas 3 and 6, that the Applicant's candidacy did not receive proper consideration, or that the selection process was void. With respect to the Applicant's plea 7, the Tribunal is not competent to conclude that the Applicant was the most qualified of all candidates, and it therefore does not enter into inquiries of that nature.

VIII. Since the application also challenges the ongoing effect of the Vacancy Management System on the Applicant's career, the Tribunal deems that paragraph XVI of Judgement No. 537, Upadhya (1991) is equally applicable here, and adopts the same findings and conclusions in this case.

IX. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the sum of $1,000 to the Applicant as compensation for the injury sustained by him.

2. Subject to paragraph XVI of Judgement No. 537, Upadhya (1991), rejects the Applicant's plea that the Vacancy Management System was invalid at the time of the contested decision.

3. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 1 November 1991

Jean Hardy
Acting Executive Secretary